MAY 31 1956

Supreme Court of the United States

No. 990 126

WAYLYN CORPORATION,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT;

GARDEN CORPORATION v. SAME;
PIEDMONT CORPORATION v. SAME;
OKLAHOMA CORPORATION v. SAME;
HILL CORPORATION v. SAME;
PONCE DARLINGTON, INC. v. SAME;
RIO PIEDRAS DARLINGTON, INC. v. SAME; and
MAYAGUEZ DARLINGTON, INC. v. SAME.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

William G. Grant
304 Grant Building
Atlanta 3, Georgia
Attorney for Petitioner

Benicio Sanchez Castano
Ochoa Building
San Juan, Puerto Rico
Garrard Harris
Banco Popular Building
San Juan, Puerto Rico
Of Counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

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Supreme Court of the United States

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WAYLYN CORPORATION,
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v.

UNITED STATES OF AMERICA,
RESPONDENT;

GARDEN CORPORATION *v.* SAME;
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RIO PIEDRAS DARLINGTON, INC. *v.* SAME; and
MAYAGUEZ DARLINGTON, INC. *v.* SAME.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Waylyn Corporation, Garden Corporation, Piedmont Corporation, Oklahoma Corporation, Hill

Corporation, Ponce Darlington, Inc., Rio Piedras Darlington, Inc., and Mayaguez Darlington, Inc., respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review here the decision and judgment of that Court rendered on April 3rd 1956, in the cases of Waylyn Corporation, Garden Corporation, Piedmont Corporation, Oklahoma Corporation, Hill Corporation, Ponce Darlington, Inc., Rio Piedras Darlington, Inc., and Mayaguez Darlington, Inc., appellants, each versus the United States of America, appellee, the same being numbered, respectively, 5039, 5040, 5041, 5042, 5043, 5044, 5046, and 5045, on the docket of said Court.

Opinions Below

The opinion of the Court of Appeals was rendered on April 3rd 1956, and will be found at page 11 *infra*, appendix "A". The opinion and judgment of the District Judge (Record 23A) will be found in 130 Fed. Supp. 783.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code. The judgment sought to be reviewed was rendered and entered on April 3rd 1956. No petition for rehearing was filed, and the mandate was forwarded to the District Court May 4th 1956.

Questions Presented

1. Whether Congress, by providing that the Commissioner of the Federal Housing Administration shall, in carrying out the provisions of the National Housing Act, "be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal" (Sec-

tion 1702, Title 12, United States Code), waived the government's immunity from suit with respect to any action arising out of acts of the Commissioner of the Federal Housing Administration in carrying out the provisions of the National Housing Act specified in Section 1702, Title 12, United States Code.

2. Whether, where the Commissioner of the Federal Housing Administration, acting on behalf of the United States of America, becomes the assignee and holder, for value received, of a mortgage note theretofore insured by the Federal Housing Administration pursuant to the provisions of the National Housing Act, and suit on the mortgage note and for the foreclosure of the mortgage is brought in the name of the United States of America as plaintiff, the defendant has the right to file and maintain a counterclaim for damages resulting from the wrongful acts of the Commissioner of the Federal Housing Administration in carrying out the provisions of the National Housing Act specified in Section 1702, Title 12, United States Code.

3. Whether, where a defendant has a cause of action against the Commissioner of the Federal Housing Administration for damages resulting from the wrongful acts of the Commissioner in carrying out the provisions of the National Housing Act specified in Section 1702, Title 12, United States Code, which cause of action the defendant would have the right to set up by way of counterclaim in an action brought by the Commissioner to foreclose a mortgage which has been transferred and assigned to him, this right of counterclaim can be circumvented and defeated by the expedient of having the foreclosure suit brought in the name of the United States of America as plaintiff, instead of in the name of the Commissioner.

Statute Involved

Section 1702, Title 12, United States Code, which provides as follows:

> "The Commissioner (of the Federal Housing Administration) shall, in carrying out the provisions of this sub-chapter and sub-chapters II, III, VI-VIII and X of this chapter, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal."

Statement of the Case

The United States of America brought suits against the several petitioners in certiorari in the United States District Court for the District of Puerto Rico, seeking to foreclose mortgages on real property owned by the several petitioners (Record 8a, 31a, 45a, 60a, 75a, 89a, 105a, and 122a). Jurisdiction was based on Section 1345, Title 28, United States Code.

The mortgages had originally been insured by the Commissioner of the Federal Housing Administration, but each had subsequently, upon default in the payment thereof, been assigned to, and were held by the Commissioner pursuant to the provisions of the National Housing Act.

Each of the petitioners in certiorari filed a defense and counterclaim averring that the plaintiff, the United States of America, "is subject to all liabilities, counterclaims and equities to which the Federal Housing Commissioner or the Federal Housing Administration would be subject if this action were brought by the Federal Housing Commissioner or the Federal Housing Administration", and seeking to set off damages alleged to have resulted from the wrongful acts of the Commissioner of the Federal Housing Adminis-

tration in carrying out the provisions of the National Housing Act (Record, 14a, 37a, 52a, 67a, 81a, 97a, 113a and 130a).

The United States of America filed motions to dismiss the counterclaims (Record, 22a) upon the following grounds:

1. The Court lacks jurisdiction over the subject-matter.
2. The counterclaim — fails to state a claim upon which relief can be granted.

The District Judge, by a single order entered in all of the cases, and without going into the merits of the counterclaims, sustained the motions to dismiss upon the ground the United States had not waived its immunity from suit and for that reason the counterclaims could not be maintained (Record, 24a).

The Court of Appeals affirmed the judgment of the District Judge (Record, 147a).

Specifications of Errors to be Urged

The Court of Appeals erred:

1. In failing to follow, and to give effect to the principle of the decisions of this Court in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381; *Federal Housing Administration* v. *Burr*, 309 U.S. 242; and *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U.S. 81 (84), wherein this Court held that waivers by Congress of governmental immunity from suit are to be liberally construed.

2. In failing to hold that Section 1702, Title 12, United States Code, which authorizes the Commissioner of the Federal Housing Administration to be sued in his official

capacity for wrongful acts in carrying out provisions of the National Housing Act, constitutes a waiver of the Government's immunity from suit with respect to any wrongful act of the Commissioner, in his official capacity, in carrying out the provisions of the National Housing Act specified in said Section.

3. In failing to hold that the petitioners in certiorari had the right to set up by way of counterclaims in the suits brought in the name of the United States of America as plaintiff, any cause of action which they might have set up had the suits been brought in the name of the Commissioner of the Federal Housing Administration.

4. In failing to reverse the judgment of the District Judge which had dismissed the counterclaims on the ground they could not be maintained because the United States of America had not waived its immunity from suit.

Reasons for Granting Writ

1. The Court of Appeals, by Its Judgment Affirming the Judgment of the District Judge, Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Honorable Court.

The Court of Appeals held that where proceedings to foreclose mortgages held by the Commissioner of the Federal Housing Administration, as assignee, are brought in the name of the United States, the defendants cannot assert counterclaims which they would have had the right to assert had the Commissioner brought the foreclosure proceedings in his own name as he is by law authorized to do.

The basis of the decision of the Court of Appeals is the Government's inherent immunity from suit where its immunity has not been waived.

The question for determination is whether Section 1702

of Title 12 of the United States Code, authorizing the Commissioner of the Federal Housing Administration to be sued *in his official capacity* for a wrongful act in carrying out specified provisions of the National Housing Act[1], constitutes a waiver of the Government's immunity from suit, where, as in the cases at bar, the Government seeks to foreclose in its own name mortgages which have been duly assigned to and are held by the Commissioner of the Federal Housing Administration.

We, of course, concede the fact Congress did not in express terms authorize the filing of suits or counterclaims against the Government. But it did authorize the filing of suits and counterclaims against the Commissioner *in his official capacity*, and we respectfully submit that in the circumstances mentioned below, the effect of the authorization was to waive the Government's immunity from suit in any action arising from the acts of the Commissioner in carrying out the specified provisions of the National Housing Act.

Although Congress created what would ordinarily appear to be an independent entity, the Federal Housing Administration is not one. Its existence as an entity separate and apart from the Government, is, in view of the decision of this Court in *United States* v. *Summerlin*, 310 U.S. 414, fiction pure and simple. It is merely an instrumentality through which the Government is authorized to act in a given sphere, and its Commissioner is nothing more nor less than an agent of the Government whose acts "must be regarded as governmental functions and entitled to whatever immunity attaches to those functions when performed

[1] "The Commissioner shall, in carrying out the provisions of this sub-chapter and sub-chapters II, III, VI-VIII and X of this chapter be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." Title 12, U.S.C., Section 1702.

by the Government itself through its departments".[2] That this is true—that the Commissioner is simply an agent through which the Government functions and his acts are but the acts of the Government itself—is clear from the fact the title to property conveyed to the Commissioner pursuant to the provisions of the National Housing Act is *ipso facto* vested in the Government without transfer, assignment or the execution of any instrument by the Commissioner.[3]

When it created the Federal Housing Administration and authorized the Commissioner thereof to be sued in his official capacity, Congress is bound to have known that but for the consent given by it, the Commissioner would have possessed the Government's immunity from suit, because his acts "must be regarded as governmental functions and entitled to whatever immunity attaches to those functions when performed by the Government itself through its departments",[4] and that the Government, and not the Commissioner, would be the real party in any action which might be brought against the Commissioner as a result of a wrongful act on his part in carrying out the specified provisions of the National Housing Act.

In these circumstances, isn't it reasonable to assume that it was the intent of Congress to waive the Government's immunity from suit in any action arising out of an act of the Commissioner in carrying out the specified provisions of the National Housing Act, regardless of whether suit be brought against the Commissioner, or against the Government itself in cases such as here presented, where the Government has elected to assert titles to and seeks to foreclose

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[2] *Pittman, Clerk* v. *Home Owners Loan Corporation*, 308 U.S. 21; *Graves, Et Al., Commissioners, Etc.* v. *New York, ex rel. O'Keefe*, 306 U.S. 466.

[3] *United States* v. *Summerlin*, 310 U.S. 414.

[4] *Pittman, Clerk* v. *Home Owners Loan Corporation*, and *Graves, Et Al., Commissioners, Etc.* v. *New York, ex rel. O'Keefe*, supra.

mortgages which have been duly assigned to and are held by the Commissioner in his own name?

This Court has on more than one occasion held that waivers of the Government's immunity from suit are to be liberally construed.[5] If we start with this premise, it would seem to follow that Section 1702 of Title 12, U.S.C. must be construed as a waiver of the Government's immunity from suit in the cases at bar.

To construe the statute otherwise would be to hold that Congress did a vain thing when it authorized the filing of suits against the Commissioner of the Federal Housing Administration, for there cannot be a case where the right given cannot be circumvented and defeated by the simple expedient of either bringing suit in the name of the Government, or, where the Commissioner is sued in his official capacity, of pleading that he is merely an agent of the Government, and that the Government, and not the Commissioner, is the real party.

2. In Rendering Its Judgment Affirming the Judgment of the District Judge, the Court of Appeals Failed to Follow, and Failed to Give Effect to the Principle of the Decisions of this Court in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381; *Federal Housing Administration* v. *Burr*, 309 U.S. 242; and *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U.S. 81 (84), Wherein this Court Held that Waivers by Congress of Governmental Immunity from Suit are to be Liberally Construed.

We respectfully submit that in rendering its judgment, the Court of Appeals placed a strict, and not a liberal construc-

[5] *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381; *Federal Housing Administration, etc.* v. *Burr*, 309 U.S. 242; *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U.S. 81 (84).

tion on the provisions of Section 1702, Title 12, United States Code.

WHEREFORE, your petitioners pray that a writ of certiorari be granted under the Seal of the Court, directed to the United States Court of Appeals for the First Circuit, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

WILLIAM G. GRANT
Attorney for petitioners

BENICIO SANCHEZ CASTANO
GARRARD HARRIS
Of Counsel

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5039.

WAYLYN CORPORATION,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLEE;

No. 5040.

GARDEN CORPORATION *v.* SAME;

No. 5041.

PIEDMONT CORPORATION *v.* SAME;

No. 5042.

OKLAHOMA CORPORATION *v.* SAME;

No. 5043.

HILL CORPORATION *v.* SAME;

No. 5044.

PONCE DARLINGTON, INC. *v.* SAME;

No. 5045.

RIO PIEDRAS DARLINGTON, INC. *v.* SAME; and

No. 5046.

MAYAGUEZ DARLINGTON, INC. *v.* SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

[130 F. Supp. 783]

Before MAGRUDER, *Chief Judge*, and MARIS and WOODBURY, *Circuit Judges*.

William G. Grant, with whom *Garrard Harris* and *Benicio Sanchez Castano* were on brief, for appellants.

Ruben Rodriguez Antongiorgi, United States Attorney, for appellee.

OPINION OF THE COURT.

April 3, 1956.

MAGRUDER, *Chief Judge*. These cases are all essentially the same, and reference will be made only to *Waylyn Corp. v. United States*, No. 5039.

The United States filed its complaint in the United States District Court for the District of Puerto Rico, seeking in a foreclosure proceeding to recover on a mortgage note given by defendant Waylyn Corp. to Manufacturers Trust Co. The loan for which the note was given was secured by a mortgage insured by the Federal Housing Administration pursuant to the provisions of the National Housing Act, 12 U.S.C. §§ 1702 *et seq.* Upon a default, as alleged, the mortgage note was assigned to Guy T. O. Hollyday, as Federal Housing Commissioner, together with all rights under the mortgage securing the same.

Waylyn Corp. filed an answer and a counterclaim for damages against the United States in the sum of $1,551,902.00. By virtue of the allegations of the answer and counterclaim, defendant's prayer was that the complaint be dismissed and that an affirmative judgment be rendered against the United States in the sum just mentioned.

The counterclaim undertook to state a cause of action sounding in tort, alleging that Waylyn Corp. had suffered pecuniary losses in consequence of wrongful action of the Federal Housing Administration in willfully and arbitrarily withholding occupancy permits and willfully and arbitrarily causing the publication of a newspaper announcement to

the effect that Waylyn Corp. was without authority to sell the dwellings in the housing project covered by the mortgage.

Upon motion, the district court entered a "final judgment" dismissing this counterclaim for lack of jurisdiction, reciting in accordance with Rule 54(b) that there was no just reason for delay. The present appeal is from this judgment.

In its memorandum opinion the district court considered, and rejected, the possibility that the counterclaim might fall within the consent of the United States to be sued as contained in the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. Appellant makes no challenge to this ruling of the district court, and we take it that we may leave the Federal Tort Claims Act out of account.

In the National Housing Act, it is provided (12 U.S.C. § 1702) that the Federal Housing Commissioner shall, in carrying out the provisions of the Act, "be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." This no doubt constituted a partial waiver of governmental immunity, to the extent that it permitted a suit against the Commissioner in his official capacity; but the statutory provision falls short of a consent that the United States as such may be sued on a claim arising out of the administration of the National Housing Act. The practical difference is pointed out in *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940). There, after holding that 12 U.S.C. § 1702 should be construed liberally to constitute a consent that the Federal Housing Administrator (now Commissioner) might be subjected to garnishment proceedings on account of moneys payable by the Federal Housing Administration to an employee, the Court ended up its opinion with the following (309 U.S. at 250-51):

"Petitioner claims that execution should not have been allowed under the judgment. The Act permits the Administrator 'to sue and be sued in any court of competent jurisdiction, State or Federal.' Whether by Michigan law execution under such a judgment may be had is, like the availability of garnishment, *Federal Land Bank* v. *Priddy* [295 U.S. 229 (1935)], a state question. And so far as the federal statute is concerned, execution is not barred, for it would seem to be part of the civil process embraced within the 'sue and be sued' clause. That does not, of course, mean that any funds or property of the United States can be held responsible for this judgment. Claims against a corporation are normally collectible only from corporate assets. That is true here. Congress has specifically directed that all such claims against the Federal Housing Administration of the type here involved 'shall be paid out of funds made available by this Act.' § 1. Hence those funds, and only those, are subject to execution. The result is that only those funds which have been paid over to the Federal Housing Administration in accordance with § 1 and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution. Since no consent to reach government funds has been given, execution thereon would run counter to *Buchanan* v. *Alexander* [4 How. 20 (1846)] *To conclude otherwise would be to allow proceedings against the United States where it had not waived its immunity.* This restriction on execution may as a practical matter deprive it of utility, since funds of petitioner appear to be deposited with the Treasurer of the United States and payments and other obligations are made through the Chief Disbursing Officer of the Treasury. But that is an inherent limitation, under this statutory scheme, on the legal remedies

> which Congress has provided. And since respondent obtains its right to sue from Congress, it necessarily must take it subject to such restrictions as have been imposed. The fact that execution may prove futile is one of the notorious incidents of litigation, as is the fact that execution is not an indispensable adjunct of the judicial process." [Italics added.]

Whether we like the doctrine of sovereign immunity of the United States or not, we must take it as established law that the United States cannot be sued without its consent. It is clear that no court, federal or state, would have had jurisdiction to entertain an original complaint by Waylyn Corp. against the United States on the cause of action stated in the counterclaim. The filing of a suit in the name of the United States does not in itself amount to a waiver of sovereign immunity, subjecting the United States to an affirmative adverse judgment on a counterclaim filed by the defendant in such suit. This settled doctrine is reaffirmed, maybe out of an excess of caution, in Rule 13(d) of the Federal Rules of Civil Procedure, providing:

> "Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."

As this court said in *United States* v. *Silverton*, 200 F.2d 824, 826 (1952):

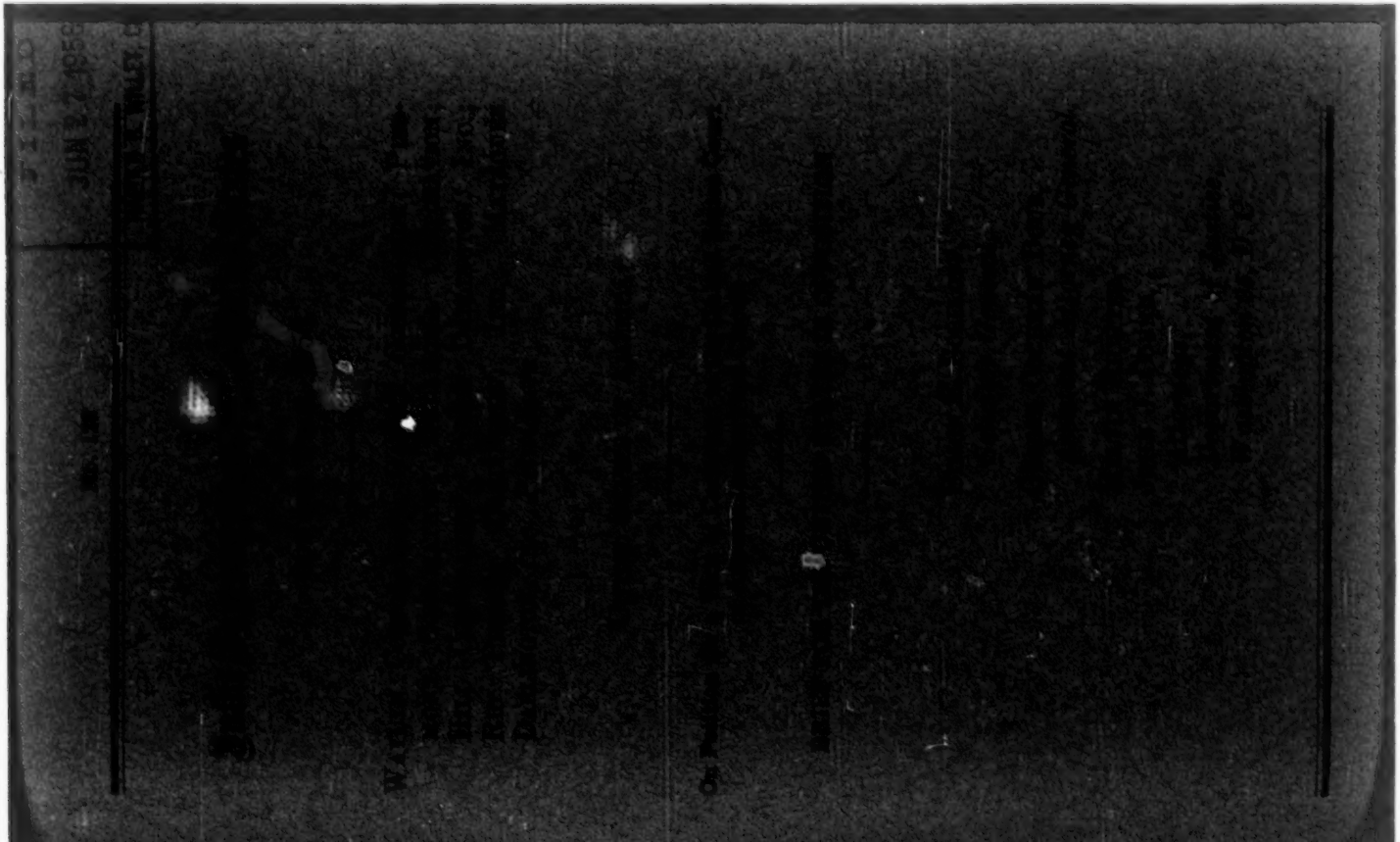
> "But it is clear that the United States, by filing its original complaint against the defendant in the court below, did not thereby consent to be sued on a counterclaim based upon a cause of action as to which it had not otherwise given its consent to be sued. *United States* v. *Shaw*, 1940, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888."

Compare *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955), which is not cited or relied on by appellant herein, and which case we suppose was not intended to overturn the holding in *United States* v. *Shaw*, 309 U.S. 495 (1940).

The situation presented in this case is no doubt peculiar, and we are frank to say that it does not look quite right. Perhaps this results from the fact that though 12 U.S.C. § 1702 would have permitted the instant complaint to have been filed by the Federal Housing Commissioner in his own name and in his official capacity, nevertheless the complaint here was filed in the name of the United States itself as the real party in interest. And we are bound to recognize that such suit may be prosecuted by the United States in its own name, since it was so held in *United States* v. *Summerlin*, 310 U.S. 414 (1940).

Neither the district court nor we have adjudicated the merits of the cause of action asserted in the counterclaim. The judgment dismissing the counterclaim for lack of jurisdiction is without prejudice to the assertion against the Federal Housing Commissioner in some court of competent jurisdiction of the cause of action alleged in the counterclaim. Nor do we consider or determine whether the United States, under its complaint still pending in the court below, would be entitled to a judgment against Waylyn Corp. for the full amount unpaid on the mortgage note without diminution by way of set-off for damages which might have been asserted in a claim against the Federal Housing Commissioner had that official brought the present suit.

The judgments of the District Court are affirmed.



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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 126

WAYLYN CORPORATION; GARDEN CORPORATION; PIEDMONT CORPORATION; OKLAHOMA CORPORATION; HILL CORPORATION; PONCE DARLINGTON, INC.; RIO PIEDRAS DARLINGTON, INC.; MAYAGUEZ DARLINGTON, INC., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Puerto Rico (R. 23a) is reported at 130 F. Supp. 783. The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 12-16) is reported at 231 F. 2d 544.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1956 (Pet. App. 12). The petition for a

writ of certiorari was filed on May 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, solely by reason of having authorized suit against the Federal Housing Commissioner, Congress has consented to suits against the United States by counterclaim in actions brought by the United States upon claims assigned to it through the Commissioner.

STATUTE INVOLVED

The pertinent provisions of Section 1 of the National Housing Act, as amended (48 Stat. 1246, as amended, 12 U.S.C. 1702):

> The President is authorized to create a Federal Housing Administration, all of the powers of which shall be exercised by a Federal Housing Commissioner (hereinafter referred to as the "Commissioner"), who shall be appointed by the President, by and with the advice and consent of the Senate. * * * The Commissioner * * * may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this subchapter and subchapters II, III, VI-VIII, and X of this chapter, without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of funds made available by this chapter: *Provided*, That notwithstanding any other provisions of law

except provisions of law hereafter enacted expressly in limitation hereof, all expenses of the Federal Housing Administration in connection with the examination and insurance of loans or investments under any subchapter of this chapter, all properly capitalized expenditures, and other necessary expenses not attributable to general overhead in accordance with generally accepted accounting principles shall be considered nonadministrative and payable from funds made available by this chapter, except that, unless made pursuant to specific authorization by the Congress therefor, expenditures made in any fiscal year pursuant to this proviso, other than the payment of insurance claims and other than expenditures (including services on a contract or fee basis, but not including other personal services) in connection with the acquisition, protection, completion, operation, maintenance, improvement, or disposition of real or personal property of the Administration acquired under authority of this chapter, shall not exceed 35 per centum of the income received by the Federal Housing Administration from premiums and fees during the preceding fiscal year. The Commissioner shall, in carrying out the provisions of this subchapter and subchapters II, III, VI-VIII, and X of this chapter, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

STATEMENT

Each of the eight petitioners, in return for a loan made to it, gave a mortgage-note to the Manufacturers Trust Company, and secured it with a mortgage insured by the Federal Housing Administration (R. 8a-

10a, 15a; 31a-33a, 38a; 45a-47a, 53a; 60a-62a, 68a; 75a-77a, 81a; 89a-92a, 98a; 105a-109a, 114a; 122a-125a, 131a). Upon an alleged default in payment, these notes and mortgages were assigned to the Federal Housing Commissioner (Pet. App. 12). The United States thereupon brought actions against each of the petitioners in the United States District Court for the District of Puerto Rico, seeking to recover payment of the notes and, in default thereof, to foreclose the mortgages (R. 12a, 35a, 50a, 65a, 79a, 96a, 112a, 128a).

Each of the petitioners answered, praying that the action against it be dismissed (R. 14a, 37a, 52a, 67a, 81a, 97a, 113a, 130a). In addition, by way of counterclaim, each sought an affirmative judgment against the United States (R. 18a, 41a, 56a, 70a, 84a, 101a, 117a, 134a)[1] for an amount in excess of that asserted in the

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[1] The counter-claims were as follows: Five of the petitioners (Waylyn, Garden, Piedmont, Oklahoma, Hill), which had mortgaged planned housing developments, alleged that FHA had "wilfully and arbitrarily" withheld occupancy permits, necessary for the rental of the houses, "in order to cause damage to [them] and to bring about the loss of the said housing project[s] by [them]"; and that FHA had "wilfully and unlawfully" caused the publication of articles or announcements to the effect that the petitioners were without legal authority to sell the houses, thus preventing the sale of the houses at a substantial profit (R. 19a-21a; 42a-44a; 56a-59a; 71a-74a; 85a-87a). The other three petitioners (Ponce Darlington, Rio Piedras Darlington, Mayaguez Darlington), which had mortgaged planned apartment houses, alleged that, despite the fiduciary relationship FHA allegedly had with each of them as their sole preferred stockholder, FHA had refused to cooperate in a sincere effort to make the apartment buildings self-supporting and self-liquidating, and had "deliberately, wilfully and calculatingly precipitated a financial crisis in [their] business by instituting the foreclosure action in [these] case[s] for the purpose of unjustly enriching itself"; and that by imposing "illegal, unreasonable, unjustified and unwarranted requirements" in connection with the construction of the buildings, not called for by the plans,

Government's complaint. The Government moved to dismiss the counterclaims for lack of jurisdiction over the subject matter and for failure to state a cause of action (R. 22a). Granting the motion, the district court dismissed the counterclaims on the ground that, irrespective of the Federal Housing Commissioner's amenability to suit, the United States, which had the right to bring the FHA actions against petitioners in its own name, had not consented to the maintenance of counterclaims against it (R. 24a-31a). The court entered a "final judgment" on this order stating, in accordance with Rule 54(b), that there was no just reason for delay (Pet. App. 13). The court of appeals affirmed (Pet. App. 12-16).

ARGUMENT

1. That the United States may bring an action in its own name on claims assigned to the Federal Housing Administration is beyond dispute since, in receiving such assignments, the Federal Housing Administration acts as an agent of the Government, and the Government is the real party in interest. *United States* v. *Summerlin*, 310 U.S. 414; *cf. Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536; *United States* v. *Remund*, 330 U.S. 539, 542-543. Accordingly, both courts below were correct in holding that the actions here involved were properly brought by, and in the name of, the United States.

FHA had caused the construction to be delayed through a controversy with the contractors (R. 101a-104a; 117a-121a; 134a-137a).

Each of the counterclaims exceeded the amount sought by the United States against the corporation making the claim.

The United States may exercise this right to bring an action without thereby opening itself to counterclaims on related causes of action. *United States* v. *Shaw*, 309 U.S. 495; *North Dakota-Montana Wheat Growers' Association* v. *United States*, 66 F. 2d 573 (C.A. 8), certiorari denied, 291 U.S. 672). Thus, if the petitioners' counterclaims are to be sustained, it is necessary to show an express consent by the United States. As the courts below correctly held, no such consent exists.

The sole basis of jurisdiction urged by petitioners is the National Housing Act,[2] which provides (Section 1) that

> The Commissioner shall, in carrying out the provisions of [subchapters I, II, III, VI-VII and X of the Chapter on National Housing] be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

Under the decisions of this Court, however, it is clear that this provision for suit against the Federal Housing Commissioner does not permit the maintenance of a counterclaim against the United States, even when the claim on which the United States is suing is one which had been assigned to the Commissioner.

Thus, in the closely analogous case of *United States* v. *Shaw*, 309 U.S. 495, the United States had filed, in a state court proceeding, a claim derived from the

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[2] Even if the counterclaims were of a type cognizable under the Tucker Act, 28 U.S.C. 1346(a), each of them was greatly in excess of the amount on which suit would be permitted in a district court, the smallest of them being for more than $1,500,000.

Fleet Corporation, whose assets and obligations the United States had assumed. Although the Fleet Corporation had itself been held subject to suit (*Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U.S. 549), this Court held that a cross-claim against the United States based upon an obligation of the Fleet Corporation could not be maintained.

2. Petitioners contend that, because suits on claims assigned to the Commissioner in his official capacity may be brought in the name of the United States, the Commissioner is not an independent entity, and that the consent to suit in Section 1 must have been intended as a consent to suit against the United States (Pet. 7-8). There is, of course, no warrant for this contention in the statute, and, as noted by both courts below, it is refuted by the distinction drawn by this Court in *Federal Housing Administration* v. *Burr*, 309 U.S. 242, between suits against the Commissioner and suits against the United States.

In the *Burr* case, this Court, while holding that the FHA could be sued in a garnishment proceeding, declared that "that does not, of course, mean that any funds or property of the United States can be held responsible for this judgment. * * * To conclude otherwise would be to allow proceedings against the United States where it had not waived its immunity." (309 U.S. at 250.) The Court recognized that this restriction on execution "may as a practical matter deprive it of utility," but stated that "that is an inherent limitation, under this statutory scheme, on the legal remedies which Congress has provided" (309

U.S. at 251). Although both courts below stressed the *Burr* holding (R. 28a-30a, Pet. App. 13-15), petitioners make no effort to show how the present case differs in any way.

3. Petitioners further urge that to permit the United States to bring actions on claims assigned to it through the Commissioner, without subjecting itself to counterclaims which would lie against the Commissioner, renders nugatory the statutory permission to sue the Commissioner (Pet. 9). This is not so. While the limitation may result in some inconvenience to petitioner, the congressional waiver permits the maintenance of original actions directly against the Commissioner.[3] On the other hand, if petitioner's contention were sustained, the undoubted right of the United States to proceed in these actions in its own name could not be exercised without opening the Government to what this Court, in the *Burr* case, has recognized would be a different, and far broader, liability than is possible under the limited waiver of immunity provided by Section 1 of the National Housing Act.

[3] In view of the waiver, there, of course, is no basis for petitioners' claim that the Government may defeat suits against the Commissioner by "pleading that he is merely an agent of the Government, and that the Government, and not the Commissioner, is the real party"

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MELVIN RICHTER,
JOHN J. COUND,
Attorneys.

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